FILED
JUL 12 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-54

CITY OF LOS ANGELES,

Petitioner,

vs.

FANCHON BLAKE, et al.,

Respondents.

BRIEF OF THE COUNTY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN H. LARSON
County Counsel

WILLIAM F. STEWART
Chief, Labor Relations Division

ALAN K. TERAKAWA
Deputy County Counsel
Labor Relations Division

648 Hall of Administration
Los Angeles, California 90012
(213) 974-1957

Attorneys for Amicus
COUNTY OF LOS ANGELES

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979
No.

CITY OF LOS ANGELES,

Petitioner,

vs.

FANCHON BLAKE, et al.,

Respondents.

BRIEF OF THE COUNTY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN H. LARSON
County Counsel

WILLIAM F. STEWART
Chief, Labor Relations Division

ALAN K. TERAKAWA
Deputy County Counsel
Labor Relations Division

648 Hall of Administration
Los Angeles, California 90012
(213) 974-1957

Attorneys for Amicus
COUNTY OF LOS ANGELES

TOPICAL INDEX

		Page
Table of Authorities		ii
INTEREST OF THE AMICUS CURIAE		1
SUMMARY OF ARGUMENT		2
ARGUMENT		3
I	THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH ESTABLISHED LAW IN THE STATE OF CALIFORNIA AND REQUIRES IMMEDIATE RESOLUTION	3
II	THE LEGAL STANDARDS THAT THE NINTH CIRCUIT WOULD IMPOSE ARE UNPRECEDENTED, CONTRARY TO EXISTING AUTHORITY, AND WOULD COMPROMISE THE PROVISION OF EFFECTIVE LAW ENFORCEMENT SERVICES TO THE PUBLIC	5
III	IMMEDIATE REVIEW OF THE LEGAL STANDARDS IN QUESTION WOULD BENEFIT ALL PARTIES AND PREJUDICE NONE	7
CONCLUSION		8

TABLE OF AUTHORITIES

Cases	Page
Dothard v. Rawlinson, 433 U.S. 321 (1977)	6
Furnco Constr. Corp. v. Waters, 98 S. Ct. 2943 (1978)	6, 7
Hardy v. Stumph, 21 Cal. 3d 1 (1978)	4, 5
Rule	
Rule 42(4), Rules of Supreme Court	1
Statutes	
Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, et seq.	2, 3, 6

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term 1979
No.

CITY OF LOS ANGELES,

Petitioner,

vs.

FANCHON BLAKE, et al.,

Respondents.

BRIEF OF THE COUNTY OF LOS ANGELES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF THE AMICUS CURIAE

This brief amicus curiae is hereby submitted pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States in support of the petition for certiorari. Amicus, the County of Los Angeles, public entity, is a political subdivision of the State of California and maintains a law enforcement agency, the Sheriff of the County of Los Angeles, as a department thereof.

As a public employer, amicus is subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, et seq. (hereinafter, "Title VII"). Because of the nature of the decision of which Petitioners seek this Court's immediate review, amicus is concerned that its employment practices will require substantial and costly revision to comply with the requirements of Title VII as set forth therein.

SUMMARY OF ARGUMENT

Amicus is concerned that the decision of the United States Court of Appeals for the Ninth Circuit in the case of Fanchon Blake, et al. v. City of Los Angeles, et al., Nos. 77-3595 and 77-3601, filed May 2, 1979, will have the effect of prohibiting the use of height limitations and physical abilities tests in the Ninth Circuit as a matter of law, regardless of the evidentiary showing that Petitioners may make at trial. Such a consequence is inevitable because the Ninth Circuit went beyond the proper grounds for denying a motion for summary judgment and based its decision on standards which are in conflict with established law.

To the extent that the decision of the Ninth Circuit requires that the "business necessity" of a challenged employment practice must always be shown in order to rebut a prima facie case of discrimination and to the extent that the legal standards enunciated in the decision for establishing

the "business necessity" of a challenged employment practice generally apply to cases brought under Title VII, it must be initially determined whether or not the pronouncements of the Ninth Circuit are a correct interpretation of the law. Such a threshold determination is essential before it can be ultimately determined at trial whether or not sufficient evidence has been adduced to support Petitioners' particular use of a height limit and physical abilities test.

This threshold determination of proper legal standards is particularly crucial because such standards would substantially affect the selection practices of amicus and other public entities with law enforcement agencies, regardless of whether or not Petitioners could adduce sufficient evidence at trial to carry their burden in justifying their particular use of a height limit and physical abilities test as selection devices.

ARGUMENT

I

THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH ESTABLISHED LAW IN THE STATE OF CALIFORNIA AND REQUIRES IMMEDIATE RESOLUTION

Of particular concern is the effect of the Ninth Circuit's decision upon physical abilities

testing in California, especially since the job-relatedness of such testing has only recently been upheld by the State Supreme Court in Hardy v. Stumph, 21 Cal. 3d 1 (1978) under a different legal standard, which amicus submits is the proper one.

In Hardy, a case alleging sex discrimination under Title VII as well as Constitutional equal protection provisions, the California Supreme Court found that the challenged physical agility test, which had a severe disproportionate impact on women and which included, inter alia, a six foot wall climb which plaintiff had failed, was both "reasonably related" to job performance under the traditional equal protection standard of review and met the "validity" requirements of the Equal Employment Opportunity Commission guidelines. The Hardy case implied, at least, that the physical agility test in question was sufficiently job related without separate "validation" of its "business necessity." 1/ In that regard, the closing comment of the California Supreme Court in Hardy is worth quoting:

> ". . . Surely, it is difficult to imagine a more accurate way of

---

1/ That the ability to climb a six foot wall was an inherent part of a police officer's job was determined by both a job analysis and evidence that a local ordinance allowed walls to the height of six feet.

> testing ability to scale a six-foot wall than to scale one."
> Id, 21 Cal. 3d at 11.

II

THE LEGAL STANDARDS THAT THE NINTH CIRCUIT WOULD IMPOSE ARE UNPRECEDENTED, CONTRARY TO EXISTING AUTHORITY, AND WOULD COMPROMISE THE PROVISION OF EFFECTIVE LAW ENFORCEMENT SERVICES TO THE PUBLIC

To the extent that the Ninth Circuit requires "validation" to establish job-relatedness, even in the narrow sense in which it finds job-relatedness relevant to the "business necessity" standard, and implies that no satisfactory "validation" can be accomplished without including candidates whom the employment practice otherwise disqualifies, amicus and similar public entites would be forced to expend more funds for less effective service to the public in order to avoid expensive litigation and potential liability. Such a consequence would be inevitable under the standard imposed by the Ninth Circuit regardless of how legitimate the employment practice is later proven to be.

Such waste is totally unjustified even if, arguendo, alternate methods of selection could increase the number of women in law enforcement without seriously impairing safety or efficiency,

a showing which has not been made by Respondents, because there is absolutely no legal requirement for Petitioners to do so. Furnco Constr. Corp. v. Waters, 98 S.Ct. 2943 (1978).

In Furnco this Court made clear that so long as the challenged employment practice is "reasonably related to the achievement of some legitimate goal" (emphasis added) (Id. at 2950), the employer has carried his burden of rebutting the prima facie case of discrimination under Title VII. It is then the plaintiff's burden to show that such employment practice was a pretext for discrimination. There is no further burden on the employer to "validate" his employment practice as a "business necessity" or to modify it to accommodate more members of a protected group under Title VII. This lack of a legal requirement to modify business practices merely to increase the representation of a protected group would apply with even greater force where, as here, significant improvement in the functioning of the business was not shown by the addition of members of the protected group.

It should further be pointed out that this Court in Furnco noted in affirming the findings of the district court that there was no doubt that the "business necessity" of Furnco's employment practices was established (Id. at 2947). Earlier in the opinion, this Court had reviewed with approval the facts upon which the district court's finding of the "business necessity" of the challenged employment practices was based. There was no indication that such facts included a "validation study" of any sort and, certainly, no showing that the employer had suspended the challenged employment practice to ascertain whether the delays caused by incompetents would,

in fact, severely and negatively affect his ability to remain in business. (Id. at 2946-7.)

In terms of the height requirement in particular, this Court left as an open question in Dothard v. Rawlinson, 433 U.S. 321 (1977), the nature of evidence which it would find acceptable as justification of such a requirement. However, three Justices of this Court, in a concurring opinion, indicated that an argument in support of height and weight minima, based on the appearance of strength, rather than actual strength, although not perfectly correlated, would be persuasive justification under Title VII. Such an argument would receive short shrift with the Ninth Circuit if its interpretation of the law is not reviewed and inconsistencies with the opinion of this Court resolved.

III

IMMEDIATE REVIEW OF THE LEGAL STANDARDS IN QUESTION WOULD BENEFIT ALL PARTIES AND PREJUDICE NONE

In conclusion, amicus would strongly urge the Court to grant certiorari in this matter on the ground that no prejudice could occur to Respondents as a result of a determination of the proper legal standards to be applied on remand prior to such remand; whereas, the application of incorrect legal standards by the Ninth Circuit would necessitate further appeal and subsequent remand. Furthermore, assuming Petitioners prevail despite the standards imposed by the Ninth Circuit, it would be impossible for Petitioners to challenge

the propriety of the legal standards under which they prevailed unless some other ground for appeal were found. Thus, the Court would have to await the next case before it could correct the Ninth Circuit's misinterpretation of established law. The harm that would be suffered by amicus and others similarly situated and by the public has already been discussed. Thus, it is apparent that the issues raised by Petitioners should be addressed by this Court at this time as the only efficient and judicially economical alternative.

CONCLUSION

For these reasons, amicus believes that a writ of certiorari should issue so that the judgment and decision of the Ninth Circuit can be thoroughly reviewed.

Respectfully submitted,

JOHN H. LARSON
County Counsel

WILLIAM F. STEWART
Chief, Labor Relations Division

ALAN K. TERAKAWA
Deputy County Counsel
Labor Relations Division

Attorneys for Amicus
COUNTY OF LOS ANGELES